APPENDIX A — OPINION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA FILED DECEMBER 10, 2004

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D043787

(Super. Ct. No. GIC776631)
(Super. Ct. No. GIC785032)

CROSSPOINT VENTURE PARTNERS 1997 et al.,

Plaintiffs and Appellants,

v.

MAXIM PHARMACEUTICALS, INC., et al.,

Defendants and Respondents;

ROBERT G. McNEIL,

Intervener and Appellant.

APPEAL from a judgment of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Reversed and remanded for further proceedings.

Appendix A

Plaintiffs Crosspoint Venture Partners 1997 et al.,[1] who are former stockholders of Cytovia, Inc. (Cytovia), and Robert G. McNeil (McNeil), who is not one of the plaintiffs in this case but who intervened in the arbitration proceeding at issue here,[2] appeal a judgment entered in favor of defendants Maxim Pharmaceuticals, Inc. (Maxim Pharmaceuticals), and Maxim's principals, Kurt Gehlsen, Ph.D., and Larry Stambaugh (collectively Maxim). Cytovia, a San Diego-based biotechnology company, merged with Maxim Pharmaceuticals after the latter completed a clinical trial of a new anti-cancer drug it had developed, Maximine, for which it was seeking approval by the Food and Drug Administration (FDA). As part of the merger transaction, which was completed pursuant to the

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1. The plaintiffs in this matter are Crosspoint Venture Partners 1997; SBIC Partners II, LP; Domain Partners III, LP; DP III Associates, LP; Domain Partners IV, LP; DP IV Associates, LP; Sanderling Ventures Partners IV, LP; Sanderling IV Limited, LP; Sanderling IV Biomedical, LP; Sanderling [Feri Trust] Venture Partners IV; Sanderling Venture Partners IV Co-Investment Fund; Sanderling Venture Biomedical Partners Co-Investment Fund, LP; Sanderling IV Venture Management; Eckard Weber, M.D.; Fred Middleton; F. Richard Nichol, Ph.D.; Richard Canote; Jeff Vick; Marvin E. Rosenthale, Ph.D.; Lowell Sears; and Prasad Sunkara, Ph.D.

2. In their appellants' reply brief, the Cytovia shareholders and McNeil assert that "McNeil is a member of Sanderling Ventures and a trustee of the Sanderling Management Co. LLC Retirement Trust FBO Robert McNeil, both of which were parties compelled to arbitration. McNeil only intervened when Maxim challenged those plaintiffs' standing after they were ordered to arbitration. As a partner of the entities ordered to arbitration, McNeil also was forced to arbitrate his claims, as the partnership through which he received shares of Maxim stock had been compelled to arbitrate."

provisions of a written merger agreement (the agreement), the plaintiffs (hereafter referred to as the Cytovia shareholders) exchanged their Cytovia stock for Maxim Pharmaceuticals stock. The Cytovia shareholders had approved the merger, but did not sign the agreement, which contained an arbitration clause that required "the parties" to arbitrate disputes "relating to the *interpretation or performance* of [the agreement]." (Italics added.)

After the merger was completed, the FDA denied Maxim Pharmaceuticals' new drug application. The Cytovia shareholders brought suit against Maxim for fraud and negligent misrepresentation, alleging they had agreed to the merger and the exchange of stock based on material misrepresentations and omissions by Maxim regarding the clinical testing and negative communications from the FDA.

The court granted Maxim's petition to compel arbitration of the Cytovia shareholders' tort claims, finding they were third party beneficiaries of the agreement. A panel of arbitrators thereafter ruled in favor of Maxim. The court confirmed the arbitration award and entered judgment in Maxim's favor, awarding attorney fees and costs to Maxim in the amount of almost $923,000.

On appeal, the Cytovia shareholders and McNeil (collectively appellants where appropriate) contend the court erred by compelling them to arbitrate their claims under an agreement to which they were not parties. Specifically, they contend (1) it is undisputed that they were not parties to the agreement, and Maxim never asserted they were; (2) the court erred by ruling they were third party beneficiaries, (3) agency

principles did not bind them to the arbitration clause; and (4) their tort claims were outside the narrow scope of the arbitration clause. We conclude that because the Cytovia shareholders' claims against Maxim did not relate to the "interpretation or performance" of the agreement within the meaning of the arbitration clause, the claims fell outside the scope of that clause, the court erred by compelling arbitration of the claims, and thus the judgment must be reversed as to both the Cytovia shareholders and McNeil.

FACTUAL BACKGROUND

Cytovia was a San Diego-based, privately held biotechnology company. It was funded by biotechnology-focused venture capital firms and individual investors.

In June 2000, Maxim, a publicly traded company, acquired Cytovia through a merger in which the Cytovia shareholders received Maxim stock in exchange for their Cytovia stock. Central to the merger, according to the Cytovia shareholders, were Maxim's representations that the Phase III clinical trial of Maxim Pharmaceuticals' new drug, Maximine, had been completed in March 2000, and the results demonstrated a statistically significant increase in survival for patients suffering from metastatic melanoma, an extremely serious form of skin cancer, who were treated with a combination of Maximine and interleukin-2 (IL-2).

The merger was based on a written merger agreement (the agreement) executed in June 2000, which expressly recited that the three parties to that agreement were Maxim Pharmaceuticals, Maxim Pharmaceuticals' acquisition

company M-80 Acquisition Corporation (M-80), and Cytovia. Regarding the rights of third parties, section 10.14 of the agreement provided that, "[e]xcept for the provisions of Sections 1.5 and 1.6, none of the provisions of [the agreement] is intended to provide any rights or remedies to any Person other than the parties hereto." The agreement also contained an arbitration clause that required "the parties" to arbitrate disputes "relating to the *interpretation or performance* of [the agreement]." (Italics added.)

In December 2000, about six months after completion of the merger, the FDA denied Maxim Pharmaceuticals' new drug application for Maximine.

PROCEDURAL BACKGROUND

A. *The Cytovia Shareholders' Complaint*

The Cytovia shareholders[3] brought suit against Maxim for fraud and negligent misrepresentation. In their complaint, they alleged they had agreed to the merger and the exchange of stock based on material misrepresentations and omissions by Maxim about the purported success of the clinical testing of Maximine and about negative communications Maxim had allegedly received from the FDA regarding that testing.

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3. As already noted, McNeil was not named as a plaintiff in the Cytovia shareholders' complaint.

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B. *Maxim's Petition To Compel Arbitration and the Court's Order*

Maxim petitioned the court for an order compelling arbitration of the Cytovia shareholders' claims. Maxim claimed that the Cytovia shareholders were bound by the arbitration clause in the agreement even though they did not sign the agreement, and that their claims were subject to arbitration. In their written opposition, the Cytovia shareholders argued that they were not parties to, or intended third party beneficiaries of, the agreement; thus they had not agreed to be bound by the arbitration clause; and their tort claims against Maxim were outside the scope of the arbitration clause because the claims did not relate to the interpretation or performance of the agreement.

The court issued a telephonic ruling granting Maxim's petition to compel arbitration of the Cytovia shareholders' tort claims.[4] Following oral argument, the court confirmed the telephonic ruling, finding that the Cytovia shareholders were obligated to arbitrate their claims because they were third party beneficiaries of the agreement. The court did not address the Cytovia shareholders' argument that their claims were outside the scope of the arbitration clause.

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4. The telephonic ruling stated in part: "[Maxim's] motion to compel arbitration is granted and the action is stayed pending arbitration. [The Cytovia shareholders] are third party beneficiaries of the Merger Agreement (see Section 1.5). Therefore, [the Cytovia shareholders] are bound by the arbitration clause even though most of them did not sign it."

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C. *Arbitration, Award and Judgment*

McNeil intervened in the court-ordered arbitration proceedings, at the conclusion of which a panel of arbitrators issued an interim decision in favor of Maxim and found that Maxim, as the prevailing party, was entitled to recover its reasonable attorney fees and costs. The court thereafter confirmed the arbitration award and entered judgment in Maxim's favor, awarding it attorney fees and costs in the amount of almost $923,000. This timely appeal by the Cytovia shareholders and McNeil followed.[5]

STANDARD OF REVIEW

"'Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court.' [Citation.]" (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

DISCUSSION

In their written opposition to Maxim's petition to compel arbitration, the Cytovia shareholders argued that they were not parties to, or intended third party beneficiaries of, the agreement, and thus they had not agreed to be bound by the arbitration clause. They also argued that their fraud and negligent misrepresentation claims against Maxim were outside the scope of the arbitration clause because the claims

5. The notice of appeal was filed on behalf of the Cytovia shareholders and McNeil.

did not relate to the interpretation or performance of the agreement. The court found that the Cytovia shareholders were obligated under the arbitration clause to arbitrate their claims because they were third party beneficiaries of the agreement. The court, however, did not rule on the Cytovia shareholders' argument that their claims were outside the scope of the arbitration clause.

Appellants argue that the court erred by compelling arbitration of the Cytovia shareholders' claims because the tort claims alleged in the complaint were outside the narrow scope of the arbitration clause set forth in the agreement. We conclude that those claims were outside the scope of the arbitration clause, and thus the court erred by compelling arbitration.

A. *Applicable Legal Principles*

Under Code of Civil Procedure section 1281.2,[6] it is the province of the trial court to determine whether there is a duty to arbitrate a particular controversy that has arisen between contracting parties. (*United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808.) "In performing its duty to determine if the parties have agreed to arbitrate that type of controversy, the court is necessarily required 'to examine and, to a limited extent, construe the underlying agreement.' [Citation.] [¶] Doubts as to whether an arbitration

6. With exceptions not applicable here, section 1281.2 of the Code of Civil Procedure provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists."

clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute. [Citation.]" (*Ibid.*; *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 652.)

However, the right to arbitration rests upon contract, as "[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." (*Engineers & Architects Assn. v. Community Development Dept.*, *supra*, 30 Cal.App.4th at p. 653.) Indeed, despite California's strong policy favoring arbitration, the substantial right of a litigant to pursue claims in a judicial forum is not lightly to be deemed waived, as " 'the general policy favoring arbitration cannot replace an agreement to arbitrate.' [Citations.]" (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1371.) Simply stated, a party cannot be compelled to arbitrate a dispute that that party has not elected to submit to arbitration.

B. *Analysis*

Here, it is undisputed that the arbitration clause set forth in sections 10.18 and 10.19 of the agreement required "the parties" to arbitrate disputes "relating to the *interpretation or performance* of [the agreement]."[7] (Italics added.) As a

7. Section 10.18 of the agreement provides in part: "*If a dispute arises between the parties relating to the interpretation or performance of* [*the agreement*], including any right of setoff, and the parties cannot resolve the dispute within 30 days of a written request by either party to the other, such dispute shall be referred to the Chief Executive Officer, Chief Financial Officer or General Counsel of [Maxim Pharmaceuticals] and Chief Executive Officer, Chief Financial Officer or General Counsel (Cont'd)

preliminary matter, we note the narrow scope of the arbitration clause. In *Mediterranean Enterprises, Inc. v. Ssangyong Corp.* (9th Cir. 1983) 708 F.2d 1458, 1464, the Ninth Circuit Court of Appeals recognized both the narrow scope of an arbitration clause that restricts arbitration to " 'disputes . . . relating to the *interpretation* of the contract and matters of *performance* ' " (italics added) and the broader scope of a clause that contains the phrase "'arising out of or relating to,' the standard language recommended by the American Arbitration Association." (See also *American Recovery Corp. v. Computerized Thermal Imaging, Inc.* (4th Cir. 1996) 96 F.3d 88, 93 [acknowledging that the phrase "arising out of or relating to" in an arbitration clause is broader in scope and "capable of an expansive reach"].)

We assume without deciding that the Cytovia shareholders were either parties[8] to, or intended third party

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(Cont'd)

of [Cytovia] for resolution." (Italics added.) With exceptions not relevant here, section 10.19 of the agreement provides in part: "*Disputes that have not been successfully resolved pursuant to Section 10.18 . . . shall be settled by* a panel of three arbitrators with such *arbitration* to be held in San Diego, California, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof." (Italics added.)

8. Maxim concedes that the Cytovia shareholders (with the exception of Weber) were not signatories to the agreement. Maxim asserts, however, that the Cytovia shareholders "entered into Shareholder Agreements that *had* to be executed along with the [agreement] in order to effectuate the transaction," and "[w]hen the Merger transaction is viewed in its totality it is obvious that [the Cytovia shareholders] were parties." (Boldface & fn. omitted.)

beneficiaries, of the agreement such that they were contractually bound to arbitrate any disputes covered by the provisions of the arbitration clause. Because there is no showing that conflicting extrinsic evidence in aid of interpretation of the arbitration clause was introduced in the trial court, the question of law we must determine de novo (*NORCAL Mutual Ins. Co. v. Newton*, *supra*, 84 Cal.App.4th at p. 71) is whether the Cytovia shareholders' claims relate to the "interpretation or performance" of the agreement such that the claims are within the scope of the arbitration clause.

The record shows that the Cytovia shareholders' complaint asserted causes of action against Maxim for fraud and negligent misrepresentation. Specifically, they alleged that because the Phase III clinical trial of Maximine was critical to the merger discussions, Cytovia retained Dr. Randolph Steer, a consultant, in April 2000 to review the information provided by Maxim regarding the clinical trial. They also alleged that in early May 2000, after Maxim Pharmaceuticals issued a press release announcing positive results from the clinical trial,[9] Steer, Eckard Weber, M.D.,[10]

9. The complaint alleged that "[o]n May 2, 2000, Maxim [Pharmaceuticals] issued a press release announcing the 'first results' from the Phase III clinical trials. The press release read: 'Treatment with Maximine plus IL-2 improved survival duration over treatment with IL-2 alone in all six patient populations analyzed in the study. In addition, consistent with the results of earlier Phase II studies, the improvement in survival provided by treatment with Maximine was most significant in patients having metastases of their melanoma to the liver, a patient population that historically has a very poor prognosis for survival.'"

10. Weber was Cytovia's founder, president, chief executive officer, and chairman of the board of directors.

and others from Cytovia met with Stambaugh, Gehlsen and others from Maxim Pharmaceuticals, who gave a presentation about Maxim Pharmaceuticals, Maximine, and the Phase III clinical trial. At that meeting, Steer allegedly asked Maxim for the entire file concerning the Phase III clinical trial, specifically including the correspondence file with the FDA, and Maxim provided him with a file containing 15 to 20 pages of documents, which included correspondence between Maxim Pharmaceuticals and the FDA, as well as minutes of meetings between Maxim Pharmaceuticals and the FDA. The complaint alleged that Gehlsen, when questioned, represented to Steer that the file, which was allegedly filled with glowing reports about the communications with the FDA, was complete, there were no other communications between Maxim Pharmaceuticals and the FDA, and the file showed no negative communications from the FDA.

The Cytovia shareholders further alleged in their complaint that in early June 2000 Maxim Pharmaceuticals issued another press release to induce them to support the proposed merger, which stated: "The [Phase III clinical trial] results show that the immunomodulating agent Maximine used in combination with a lower dose regimen of [IL-2], improved survival for stage-IV malignant melanoma patients compared with those treated with the same doses of IL-2 alone." A week later, Maxim Pharmaceuticals allegedly distributed to the Cytovia shareholders an information statement representing that Maxim completed its Phase III clinical trial of Maximine in March 2000, and "the results demonstrated a statistically significant increase in survival for patients with the combination of Maximine plus [IL-2]."

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The complaint further alleged that the Cytovia shareholders, in reliance on Maxim's representations, voted to approve the merger and accept shares of Maxim Pharmaceuticals in exchange for their Cytovia stock; that in December 2000, the FDA's Oncologic Drug Advisory Committee unanimously denied Maxim's new drug application for Maximine; that the FDA's medical officer preliminary review of Maxim's new drug application found several flaws with Maxim's Phase III clinical trial and described in detail a history of written and oral communications between the FDA and Maxim dating back to April 1997, which Maxim had withheld from Cytovia and its shareholders, in which the FDA was extremely critical of the clinical trial; and that as a result of their reliance on the foregoing misrepresentations and omissions, the Cytovia shareholders, who would not have approved the merger had Maxim disclosed the true facts, suffered damages.

As the foregoing factual allegations demonstrate, the Cytovia shareholders' tort claims against Maxim involve a dispute relating to a series of allegedly fraudulent representations and omissions made by Maxim that commenced *prior* to the Cytovia shareholders' approval of the merger and the execution of the agreement in June 2000. The allegations show that the claims in question do not involve a dispute relating to the interpretation of the agreement, nor do they involve a dispute relating to the performance of the executed agreement. We conclude that the claims arose from allegedly tortious conduct that commenced before the expressly identified parties—Maxim Pharmaceuticals, M-80 and Cytovia—executed the agreement, and thus do not relate to the performance of the executed agreement.

Because the claims do not involve a dispute "relating to the *interpretation or performance* of [the agreement]" within the plain meaning of the arbitration clause at issue here, we also conclude the claims are outside the scope of the arbitration clause. Thus, even if we were to assume for purposes of this appeal that the Cytovia shareholders were either parties to, or third party beneficiaries of, the agreement, the record shows they did not agree to arbitrate the claims alleged in their complaint, and the court erred by compelling the Cytovia shareholders to arbitrate the claims.

Maxim complains that appellants "willingly" added a new claim for breach of the agreement in their demand for arbitration dated August 21, 2002. The record shows, however, that the addition of this claim in August 2002 occurred only *after* the court compelled arbitration in this matter in January 2002 following the Cytovia shareholders' vigorous efforts to oppose arbitration and defend their right to a jury trial. We view the addition of the new claim as a legal advocate's effort to exhaust every reasonable means to obtain a recovery on behalf of the clients.

We reject Maxim's contention that the Federal Arbitration Act (the FAA), title 9 United States Code section 1 et seq., compels affirmance of the judgment in this matter. The FAA "requires arbitration of a claim where a contract contains a written arbitration provision and where the contract evidences a transaction involving interstate commerce." (*Hall v. Internet Capital Group, Inc.* (D.Me. 2003) 271 F.Supp.2d 332, 334 (*Hall*).) The district court explained in *Hall* that "[t]he Supreme Court has recently reiterated that the FAA expresses a strong federal policy favoring arbitration

agreements. [Citations.]" (*Ibid.*) However, the *Hall* court also explained that the FAA establishes, as a matter of federal law, that "any *doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration." (*Ibid.*, italics added.) Here, Maxim's reliance on *Hall*, which also involved a question about the scope of an arbitration clause in a merger agreement, is misplaced. *Hall* is distinguishable in that it involved an arbitration clause that was broad in its scope. The *Hall* court stated: "Keeping in mind that any ambiguity in the language must be construed in favor of arbitration, here the parties agreed that the subject arbitration provision would *broadly cover any dispute 'arising out of' or 'relating to' the Merger Agreement.*" (*Id.* at p. 335, italics added.) Here, in contrast, as already discussed, the arbitration clause in question was narrowly limited in scope to disputes "relating to the interpretation or performance of [the agreement]." Assuming without deciding that the FAA applies, it does not compel affirmance of the judgment because, for reasons already discussed, the claims are plainly outside the scope of the arbitration clause. Because the court erred in compelling arbitration, we conclude it also erred in awarding fees and costs in favor of Maxim.

Last, we reject Maxim's contention that the judgment, including the order confirming the arbitrators' decision and the award of attorney fees and costs in favor of Maxim, should be affirmed as to McNeil on the ground he waived his right to appeal the arbitrability of his claims by voluntarily intervening in the arbitration proceeding. Maxim's reliance on *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013 is misplaced. As Maxim points out, this court explained in *Valley Casework* that "[a] person who

voluntarily joins an arbitration proceeding becomes a party to it and may be estopped from claiming to be exempt from the mandatory arbitration procedure. [Citation.]" (*Id.* at p. 1021.) However, we also explained in that case that "[a] proceeding to compel arbitration is equivalent to an *equitable action for specific performance of a contract.* [Citation.]" (*Ibid.*, italics added.) We further explained that "'"judicial enthusiasm for alternative methods of dispute resolution 'must not in all contexts override the rules governing the interpretation of contracts[,]' as *the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate.* [Citations.]'" [Citation.]" (*Id.* at p. 1022, italics added.)

Here, we have concluded (for reasons discussed, *ante*) that the court erred in compelling arbitration in this matter because the claims asserted in the Cytovia shareholders' complaint were outside the scope of the arbitration clause. In other words, contrary to Maxim's contention, the Cytovia shareholders had not voluntarily agreed to arbitrate their claims. In addition, the arbitrators' decision shows that McNeil sought to intervene—over Maxim's objection—only *after* the court erroneously compelled arbitration and *after* the witnesses completed their testimony.[11] From this record we may reasonably infer that but

11. The arbitrators's written decision stated that "[*a*]*fter* the conclusion of testimony" (italics added), Maxim made oral motions to dismiss the claims of certain claimants or, alternatively, to abate the proceedings as to certain claimants. The decision also stated: "Claimants submitted briefs in opposition thereto . . . ; [Maxim] submitted a reply [.] Claimants also submitted a motion for leave for [McNeil] to intervene and to be joined as a Claimant; [Maxim] opposed that motion. Upon reviewing the arguments, and considering the oral and written submissions, [Maxim's] motions ... are DENIED, and Claimants' motion for intervention and joinder as a Claimant of [McNeil] is GRANTED. . . ."

for the error in compelling arbitration, McNeil would not have intervened in the arbitration proceeding. Because there was no voluntary agreement to arbitrate the Cytovia shareholders' claims, there was no "mandatory" arbitration procedure within the meaning of *Valley Casework, Inc. v. Comfort Construction, Inc., supra*, 76 Cal.App.4th at page 1021. For the foregoing reasons, we conclude the judgment must be reversed as to all of the appellants, including McNeil, notwithstanding his intervention in the arbitration proceeding.[12]

DISPOSITION

The judgment is reversed in its entirety, and the matter is remanded for further proceedings. Appellants shall recover their costs on appeal.

s/ Nares
NARES, Acting P.J.

WE CONCUR:

s/ McIntyre
McINTYRE, J.

s/ Aaron
AARON, J.

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12. In light of our conclusions, we need not reach the merits of the appellants' remaining contentions that (1) it is undisputed that the Cytovia shareholders were not parties to the agreement, and Maxim never asserted they were; (2) the court erred by ruling that the Cytovia shareholders were third party beneficiaries, and (3) agency principles did not bind the Cytovia shareholders to the arbitration clause.

APPENDIX B — JUDGMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, CENTRAL DIVISION FILED DECEMBER 23, 2003

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL DIVISION**

CASE NOs. GIC776631 and GIC785032
[consolidated]

[Code of Civil Procedure § 1287.4]

DEPT: 73
JUDGE: S. Charles Wickersham

COMPLAINT FILED: October 19, 2001

CROSSPOINT VENTURE PARTNERS 1997, et al.,

Plaintiffs,

v.

MAXIM PHARMACEUTICALS, INC., et al.,

Defendants.

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MAXIM PHARMACEUTICALS, INC.,
KURT GEHLSEN; and LARRY STAMBAUGH,

Petitioners,

3i Bioscience Investment Trust PLC, Crosspoint Venture Partners 1997, L.P., SBIC Partners II, L.P., Domain Partners III, L.P., DP III Associates, L.P., Domain Partners IV, L.P., DP IV Associates, L.P., Sanderling Ventures Partners IV, L.P., Sanderling IV Limited, L.P., Sanderling IV Biomedical, L.P, Sanderling [Feri Trust] Venture Partners IV, G.P., Sauderling Venture Partners IV Co-Investment Fund, L.P., Sanderling Venture Biomedical Partners Co-Investment Fund, L.P. (aka Sanderling IV Biomedical Co-Investment Fund, L.P.), Sanderling IV Venture Management, G.P., Eckard Weber, M.D., Fred Middleton, F. Richard Nichol, Ph.D., Richard Canote, Jeff Vick, Marvin E. Rosenthale, Ph.D., Lowell Sears, Prasad Sunkara, Ph.D., and Robert G. McNeil,

Respondents.

JUDGMENT

Defendants MAXIM PHARMACEUTICALS, INC. ("MAXIM"), KURT GEHLSEN ("GEHLSEN"), and LARRY STAMBAUGH ("STAMBAUGH'), have petitioned this Court to confirm the American Arbitration Association's Interim Decision and Final Award dated June 18, 2003 and September 30, 2003 respectively (the "Arbitration Award"). After review of the papers submitted, and consideration of the arguments for and against such confirmation, this Court hereby GRANTS Defendants' Petition to Confirm the

Arbitration Award and enters judgment in favor of MAXIM, GEHLSEN and STAMBAUGH and against Plaintiffs/ Respondents 3i Bioscience Investment Trust PLC, Crosspoint Venture Partners 1997, L.P., SBIC Partners II, L.P., Domain Partners III, L.P., DP III Associates, L.P., Domain Partners IV, L.P., DP IV Associates, L.P., Sanderling Ventures Partners IV, L.P., Sanderling IV Limited, L.P., Sanderling IV Biomedical, L.P., Sanderling [Feri Trust] Venture Partners IV, G.P., Sanderling Venture Partners IV Co-Investment Fund, L.P., Sanderling Venture Biomedical Partners Co-Investment Fund, L.P. (aka Sanderling IV Biomedical Co-Investment Fund, L.P.), Sanderling IV Venture Management, G.P., Eckard Weber, M.D., Fred Middleton, F. Richard Nichol, Ph.D., Richard Canote, Jeff Vick, Marvin E. Rosenthale, Ph.D., Lowell Sears, Prasad Sunkara, Ph.D., and Robert G. McNeil (collectively, "Plaintiffs/Respondents"). Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Arbitration Award is confirmed. Plaintiffs/Respondents' claims are denied, and Plaintiffs/ Respondents shall take nothing from any of the Defendants. Defendants, as prevailing parties, shall recover from Plaintiffs/Respondents 3i Bioscience Investment Trust PLC, Crosspoint Venture Partners 1997, L.P., SBIC Partners II, L.P., Domain Partners III, L.P., DP III Associates, L.P., Domain Partners IV, L.P., DP IV Associates, L.P:, Sanderling Ventures Partners IV, L.P., Sanderling IV Limited, L.P., Sanderling IV Biomedical, L.P., Sanderling [Feri Trust] Venture Partners IV, G.P., Sanderling Venture Partners IV Co-Investment Fund, L.P., Sanderling Venture Biomedical Partners Co-Investment Fund, L.P. (aka Sanderling IV Biomedical Co-Investment Fund, L.P.), Sanderling IV

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Venture Management, G.P., Eckard Weber, M.D., Fred Middleton, F. Richard Nichol, Ph.D., Richard Canote, Jeff Vick, Marvin E. Rosenthale, Ph.D., Lowell Sears, Prasad Sunkara, Ph.D., and Robert G. McNeil $922,779.50 as their reasonable attorneys fees and costs incurred in connection with the arbitration.

DATED: 12/23/03

S. CHARLES WICKERSHAM

S. CHARLES WICKERSHAM
JUDGE OF THE SUPERIOR COURT

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AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

Case No. 73 Y 168 00359 02 ARC

Arbitration Between

3i Bioscience Investment Trust PLC, Crosspoint Venture Partners 1997, SBIC Partners II, LP, Domain Partners III, LP, DP III Associates, LP, Domain Partners IV, LP, DP IV Associates, LP, Sanderling Ventures Partners IV, LP, Sanderling IV Limited, LP, Sanderling IV Biomedical, LP, Sanderling (Feri Trust) Venture Partners IV, Sanderling Venture Partners IV Co-Investment Fund, Sanderling Venture Biomedical Partners Co-Investment Fund, LP., Sanderling IV Venture Management, Eckard Weber, M.D., Fred Middleton, F. Richard Nichol, Ph.D., Richard Canote, Jeff Vick, Marvin E. Rosenthale, Ph.D., Lowell Sears, Prasad Sunkara, Ph.D., and Robert G. McNeil,

Claimants,

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and

Maxim Pharmaceuticals, Inc., Kurt Gehlsen,
and Larry Stambaugh,

Respondents.

FINAL AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the parties hereto dated June 2, 2000, having been sworn, having heard the proofs and allegations of the parties and having previously rendered an Interim Decision dated June 18, 2003 (the "Interim Decision"), hereby AWARD as follows.

The Interim Decision is incorporated herein by this reference.

Claimants shall recover nothing from all or any of the Respondents.

Respondents, having been determined to be the prevailing party in this arbitration, shall recover from Claimants and are hereby awarded Eight Hundred Twenty Thousand Three Hundred Thirty Six Dollars and No Cents ($820,336.00) as and for, which the Panel finds to be, their reasonable attorneys' fees incurred in connection with this arbitration commencing with Respondents' receipt of the Demand for Arbitration. Respondents shall also recover from Claimants and are hereby awarded One Hundred Two Thousand Four Hundred Forty Three Dollars and Fifty Cents ($102,443.50)

as and for their costs and expenses exclusive of the arbitrators' compensation and expenses which are allocated below.

The administrative fees of the American Arbitration Association (the "Association") totaling $27,000 shall be borne by Claimants and previously paid the Association.

The compensation and expenses of the Arbitrators totaling $78,326.25 shall be borne equally by the parties, 50% by Claimants and 50% by Respondents, and deducted from deposits previously advanced the Association.

Respondents' request for interest on attorneys' fees, costs and expenses is DENIED.

This Final Award is in full settlement of all claims submitted to this arbitration.

This Final Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Dated: September 30, 2003

s/ Bruce W. Belding

s/ Richard G. Duncan, Jr.

s/ John J. McCauley

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AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

Case No. 73 Y 168 00359 02 ARC

Arbitration Between

3i Bioscience Investment Trust PLC, et al.,

Claimants,

and

Maxim Pharmaceuticals, Inc., et al.,

Respondents.

INTERIM DECISION

WE THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the parties hereto dated June 2, 2000, having been sworn and having heard the proofs and allegations of the parties, hereby render this Interim Decision.

The Parties. Claimants are 3i Bioscience Investment Trust PLC, Crosspoint Venture Partners1997, SBIC Partners II, LP, Domain Partners III, LP, DP III Associates, LP, Domain Partners IV, LP, DP IV Associates, LP, Sanderling Ventures Partners IV, LP, Sanderling IV Limited, LP, Sanderling IV Biomedical, LP, Sanderling (Feri Trust) Venture Partners IV, Sanderling Venture Partners IV Co-Investment Fund,

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Sanderling Venture Biomedical Partners Co-Investment Fund, LP, Sanderling IV Venture Management, Eckard Weber, M.D., Fred Middleton, F. Richard Nichol, Ph.D., Richard Canote, Jeff Vick, Marvin E. Rosenthale, Ph.D., Lowell Sears, Prasad Sunkara, Ph.D. and Robert G. McNeil (added pursuant to intervention authorized herein) and are collectively referred to as "Claimants" herein unless other designation is deemed appropriate or necessary. Respondents are Maxim Pharmaceuticals, Inc. ("Maxim"), Kurt Gehlsen, Ph.D., ("Dr. Gehlsen") and Larry Stambaugh and are collectively referred to as "Respondents" herein unless other designation is deemed appropriate or necessary.

The Arbitration. This arbitration was initiated by Claimants' Demand for Arbitration dated August 21, 2002 (the "Demand"). Respondents submitted their answering statement ("Response to Demand for Arbitration") dated September 12, 2002. The arbitration was conducted in San Diego, California on May 5, 6, 7, 8, 9, 12 and 13, 2003 before the undersigned (the "Panel"). Claimants were represented by Robert W. Brownlie, Esq., Terry D. Ross, Esq. and Lindsay A. Llavern, Esq. of Gray Cary Ware & Freidenrich LLP. Respondents were represented by Charles H. Dick, Jr., Esq., Katherine A. Bacal, Esq. and Shannon D. Sweeney, Esq. of Baker & McKenzie. Pursuant to the parties' request, and as ordered by the Panel, this "Interim Decision contains(s) a summary of the Panel's reasoning and/or rationale underlying the award." Scheduling Order, December 23, 2002, (the "Scheduling Order"), p. 3.

Award. An Award will be entered in favor of Respondents. Claimants shall recover nothing. Respondents are deemed

the "prevailing party" and as such shall recover their reasonable attorneys' fees, costs and expenses. The compensation and expenses of the arbitrators shall be borne equally by the parties. 50% by Claimants and 50% by Respondents.

Motions. After the conclusion of testimony Respondents made oral motions to dismiss the claims of Claimants Richard Canote, Jeff Vick, 3i Bioscience Investment Trust PLC, Sanderling Venture Partners IV, LP, Sanderling IV Limited, LP, Domain Partners III, LP, DP III Associates, LP, Domain Partners IV, LP, DP IV Associates, LP, and Crosspoint Venture Partners 1997 or, as to certain of said Claimants, alternatively and at a minimum, that the preceedings be abated as to them. Claimants submitted briefs in opposition thereto on May 15; Respondents submitted a reply dated May 29, 2003. Claimants also submitted a motion for leave for Robert G. McNeil to intervene and to be joined as a Claimant: Respondents opposed that motion. Upon reviewing the arguments, and considering the oral and written submissions, Respondents' motions, and each of them, are DENIED, and Claimants' motion for intervention and joinder as a Claimant of Robert G. McNeil is GRANTED. Respondents also opposed the reception of certain declarations submitted by Claimants after conclusion of testimony; those objections are OVERRULED, and the declarations are admitted into evidence.

Reasoning and/or Rationale Underlying Award. Claimants, as former holders of stock and/or options in Cytovia, Inc. ("Cytovia"), seek compensatory damages in the amount of $29,504,870 and $8,536,203 in interest, for a total

of $38,041,073 (Claimant's Brief Regarding. . . Damages Calculations, May 15, 2003), on theories of fraud, negligent misrepresentation and breach of contract, allegedly arising from, and caused by Claimants' justifiable reliance on Respondents' misrepresentations and/or omissions to state material facts regarding Maxim's Phase III clinical trial of and its application for approval by the Food & Drug Administration ("FDA") of its cancer drug, Maximine, and about Maxim's relations with the FDA regarding tis clinical trial and pending application in connection with Claimants' agreement to exchange their stock in Cytovia for stock in Maxim, and an allegedly false statement in the Information Statement prepared pursuant to the Merger Agreement. (Demand; Arbitration Brief of Cytovia Stockholders ["Claimants' Arbitration Brief"])

Claimants hold substantially all of the shares in Maxim which they acquired as a result of the merger of Maxim and Cytovia. They therefore stand to reap and benefits that may accrue to such shareholders if the FDA in the future approves Ceplene, Maxim's successor drug to Maximine. Claimants, however, allege that they were defrauded in their acquisition of shares in Maxim, and in agreeing to transfer their shares and/or options in Cytovia for shares and/or options in Maxim, as a result of alleged misrepresentations by the Respondents which, Claimants allege, reduced the value of the stock which they acquired by $24.66 per share and $24.65 per option as of the date of the merger excluding any sold for a profit, for their total compensatory damages claim of $29,504,870.

We do not reach the issue of damages, as we conclude that Claimants have not sustained their burden of proof that

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(1) Respondents defrauded them or that Claimants justifiably relied on any alleged misrepresentations by Respondents, (2) Respondents negligently misrepresented any fact or that Claimants justifiably relied on any representation allegedly made without reasonable basis, or (3) Respondents breached any contract, representation or warranty to Claimants.

It is undisputed that Claimants, particularly those who were in executive positions and/or otherwise involved in the management of Cytovia, are highly educated, sophisticated business persons with considerable breadth and significant depth of experience in clinical drug development, cancer treatment and the biotechnical industry. Several also have had considerable experience with clinical trials and in processing drug applications through the FDA.

Cytovia was formed in 1998. It was initially financed by $10,000,000 in venture capital and received an additional capital infusion of $2,000,000 in July 1998. It, not unlike similar companies, had a high cash burn rate. By April 1999 Cytovia had experienced difficulty in forming significant partner collaborations and/or establishing financially profitable licensing agreements, and was focusing on raising capital. Cytovia also refocused its business direction more toward clinical research and development than on its prior emphasis on screening and testing, which involved higher costs of doing business. By mid-1999 it needed another round of financing or to be acquired, according to its internal reports and documents. By the fall of 1999 it concluded that it might not be sufficiently attractive to potential investors, so it focused more on being acquired. It experienced two unsuccessful merger efforts (GPC Biotech AF and Matrix

Pharmaceuticals). In December 1999 Cytovia's venture capital owners infused an additional $3,000,000 into it. In February 2000 its management reported that its current cash was projected to only last through June. In March Cytovia was introduced to Maxim. Notwithstanding the characterization that Maxim wanted to acquire Cytovia to give it "something to fall back on after its NDA for Maximine was rejected" (Claimants' Arbitration Brief, 33:24), the Panel concludes from the evidence that the introduction to Maxim was a fortuitous opportunity for Cytovia, with which Claimants - in light of Cytovia's financial situation and needs at the time - were understandably excited and enthusiastic due in large part to Maxim's strong capitalization and, as a potential bonus, Maxim's promising cancer drug Maximine which was undergoing a Phase III clinical trial in its FDA approval process.

The stock-for-stock merger of Maxim and Cytovia occurred in June 2000. In December 2000 the FDA's Oncologic Drug Advisory Committee ("ODAC") rejected Maxim's new drug application ("NDA") regarding Maximine. The value of Maxim's shares and options dropped immediately thereafter. Claimants contend that their agreement to merge, and to transfer their shares and options in Cytovia for shares and options in Maxim, were procured as a result of their justifiable reliance on intentional or negligent misrepresentations by Respondents as to the history, status and results of Maxim's Phase III clinical trial and its application with the FDA for approval of Maximine.

As to Claimants' claim of fraud (intentional misrepresentation and/or omission), while many references and

authorities cited by Claimants are to securities laws and securities fraud cases under various statutes, it is undisputed that this is a case and claim alleging common law fraud. The claim of fraud fails since the Panel concludes that Respondents did not knowingly or intentionally make any misrepresentations to Claimants or their representatives and the Claimants did not justifiably rely on the representations that they claim were false. Based on the Panel's assessment of the evidence and the relative credibility of the witnesses and all circumstances surrounding the transaction and Respondents' actions in connection with the clinical trial and its dealing with - and anticipation of favorable action by - the FDA, the Panel concludes that Respondents had a good faith belief that Maximine would receive some form of approval from the FDA. The requisite element of intent, or *scienter,* essential to establish a claim of fraud is therefore lacking. Respondents' conduct before and after the FDA/ ODAC rejection of Maxim's NDA is consistent with Respondents' good faith belief that it would be approved, e.g., substantial investment in future plans for its marketing, hiring additional personnel, further investments, stock gifts to family, etc., and inconsistent with knowledge that the NDA would be disapproved.

As to Claimants' claim of negligent misrepresentation, while there was evidence of certain language which, in hindsight, may have been communicated to Claimants and/or their representatives with more precision, the Panel concludes that Respondents had a good faith basis for, and reasonable belief in the truth of, the statement they made to Claimants and/or their representatives as of the dates that they were made. It is conceded that Claimants' "claim for negligent

misrepresentation is supported by exactly the same facts as the fraud claim." (Claimants' Arbitration Brief, 46:88-9) It is further conceded that the only difference between claims of fraud and of negligent misrepresentation is that "... whereas fraud requires the defendant to know the falsity of his representation, negligent misrepresentation only requires that the defendant lack a reasonable ground to believe it to be true." (Id., 46:6-7) Based on the Panel's review of the evidence, conflicting testimony and assessment of the relative credibility of the witnesses and related factors, the Panel concludes that Respondents did have reasonable grounds for the statements and representations they made to Claimants and/or their representatives.

Claimants' claim of fraud and negligent misrepresentation also fail since the Panel concludes that Claimants did not sustain their burden of proof that they justifiably relied on the alleged misrepresentations. It is undisputed that justifiable reliance on alleged misrepresentations (intentional or negligent) is an essential element of each claim. (Claimants' Arbitration Brief, 35:14: Respondents' Arbitration Brief, 25:16-28:18) Here, Claimants were enthusiastic about and anxious to expedite conclusion of the merger with Maxim. Cytovia had scientists and executives with substantial relevant experience in clinical drug development, cancer treatment, the biotechnology industry, clinical trials and processing NDAs through the FDA in addition to its sophisticated business-experienced investors.

Claimants also engaged Randolph C. Steer, M.D., Ph.D., and extremely well-qualified, experienced and highly intelligent individual who had conducted 20-25 due diligence

investigations for one of Cytovia's primary investors (Domain Associates, two of whose funds were investors in Cytovia) previously, "to perform regulatory due diligence on Maxim and its Phase III clinical trial." (Claimants' Arbitration Brief, 9:3-4) In its engagement letter to Dr. Steer, Domain stated, in part, that "the consideration to be used for the purchase of Cytovia will likely be Maxim stock (so) it is essential for Domain to analyze the drivers that are going to affect Maxim's stock price over the next few years," noted that "Maxim's share price has increased five-fold since November 1999," stressed Domain's concern ("main issue") over any "negative impact . . . on the stock price" and asked for "a comprehensive clinical and regulatory assessment of Maxim's lead product, Maximine." The Domain letter also provided a detailed list of bullet-point items for Dr. Steer to address. (Exh. 162) Dr. Steer forwarded that letter to Maxim.

Dr. Steer wrote to Maxim's CEO, in part, that "following my review of (Investigator Brochure, general public information on Maxim and Maximine, key phase 3 protocols and a brief reply to each question referenced in Domain letter of April 3, 2000 [Exh. 162]). I will approach Kurt Gehlsen, CTO, for the 2 hour overview and thereafter visit the company for review of FDA correspondence and other sensitive documentation and/or issues." (Exh. 164) Dr. Steer received and reviewed materials from Maxim and conducted independent research. Dr Steer attended, with other Cytovia executives and scientists (Dr. Weber, Dr. Sunkara, Mr. Vick and Mr. Canote) a meeting at Maxim on May 8, 2000. Dr. Gehlsen gave a presentation (Exh. 220, Power Point portions), and Dr. Steer testified that he (Dr. Steer) asked several questions during the presentation all of which Dr.

Gehlsen answered. Dr. Steer was favorably impressed with the presentation, particularly regarding the progress and status of the Phase III trial and the FDA application/process. Dr. Steer testified that at the end of the presentation he asked Dr. Gehlsen for "your entire regulatory/FDA file," and that Dr. Gehlsen agreed and brought him "a file" of 20-30-40 pages in size and in response to Dr. Steer's question if this was "the entire regulatory file." Dr. Gehlsen responded, "Yes." Dr. Steer reviewed the file and testified that he said and concluded that the file was "really clean" and that he saw "no land mines in here." Dr. Steer testified that from his extensive experience with regulatory files or logs, some were huge, some were small, but it was "more normal" that the regulatory log or file would be comprised of more that 20-30-40 pages of documents. Dr. Steer did not ask for a copy of the file that he was shown. He then joined Drs. Weber and Sunkara and Mr. Canote at lunch, feeling that he had all that he needed for his report, and gave a glowing oral report of his assessment of Maxim, Maximine, the clinical trial and prospects of some form of FDA approval.

Dr. Steer then prepared and submitted his due diligence report dated May 10, 2000. (Exh. 212) In that report, in part, Dr. Steer reported that while he "did not review original data (or) conduct a typical audit of the data (he) reviewed an extensive volume of material provided directly by the company or obtained from other sources (and) extensive published manuscripts supporting the scientific rationale for this product." (pp. I-2) He also reported, in response to Domain's bullet-point question "Are the trial protocols properly designed?" that "I studied these protocols and the Investigator's Brochure in detail (and they) are very

intelligently designed. " He reported that "I also spent a lot of time in statistical issues related to the Phase 3 melanoma trial (and concluded) the statistical design is acceptable." Responding to Domain's bullet-point regarding objectivity and clarity of the clinical trial endpoints, Dr. Steer said, in part, "I consider these results to be historic in their significance." In response to the bullet point "The protocol, FDA minutes and statistical plan," Dr. Steer said, "The protocols are excellently crafted and the statistical plan is solid. *I reviewed the entire regulatory log from January 1997 until April 2000 and I do not see any landmine or smoking gun related to regulatory issues. Moreover, it is clear to me that the company understands the nature of FDA communications*." (Id., p. 4, Italics added.)

Dr. Steer testified that he uses the terms "log" and "file" in this context synonymously or interchangeably. Dr. Steer testified that he was not shown a multi-page document entitled "IND 52.603 Chronological History" (Exh. 349) on May 8, 2000, and that if he had seen it "Multiple points would have exploded in my mind," and that first entry on it of "1/31/97" would have been inconsistent with the slide in Dr. Gehlsen's Power Point presentation that the original protocol was submitted in July 1997. He further testified that he had not seen a copy of Maxim's letter to the FDA dated January 31, 1997 (Exh. 6) until April 2003, that it was not in the file which he was shown on May 8, 2000, and that if it had been in the file it would have been inconsistent with what Dr. Gehlsen had said about the initial submission having been in July 1997. Since the uncontradicted testimony is that all correspondence with the FDA regarding the Maximine application was logged in the chronological history (Exh.

349), and the earliest reference therein is to activity or correspondence in January 1997, a question arises as to what Dr. Steer meant by having "reviewed the entire regulatory log from January 1997. . . ." Only one document seems to have that characteristic, and Dr. Gehlsen testified that he caused a copy of it (Exh. 349) to be provided for Dr. Steer on May 8, 2000. Dr. Steer, as noted above, did not request or obtain a copy of the file he was furnished on May 8, 2000, and he testified that sometime before December 2000 (prior to the ODAC review/rejection) he destroyed all documents in his files relating to this assignment (his notes from the May 8, 2000 meeting, the journal articles and the materials that Mr. Stambaugh, Maxim's CEO, had sent him) along with "hundreds of thousands" of other documents that he had been storing. The Panel therefore questions the accuracy of Dr. Steer's recollection of what he was shown on May 8, 2000. Also in attendance at the May 8, 2000 meeting were Drs. Weber and Sunkara and Messrs. Vick and Canote, all of whom had varying degrees of experience with clinical trials and with the FDA; they, as well as Dr. Steer, could have pursued issues and questions further, and they all knew of uncertainties inherent in any FDA application (". . . approval is never guaranteed." Dr. Steer, Exh. 212, p 4, par. 14) and that usually regulatory logs/files are comprised of many many documents or boxes of documents, filings, submissions, amendments, reports, minutes, etc., and not confined to a 'file' of 20-30-40 pages. Dr. Weber also testified that he independently conducted some investigation and due diligence. The Panel is not persuaded that Respondents hindered any aspect of Claimants' due diligence investigation or concealed any information.

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Respondents were enthusiastic and anxious over the merger and the opportunities it presented. Claimants made a business decision to proceed and were afforded access to all relevant information. They did not justifiably rely on any alleged misrepresentations.

Claimants' claim of breach of contract, warranty and/or representation, which asserts that the statement in the Information Statement that the Phase III Clinical trial "results demonstrated a statistically significant increase in survival for patients with the combination of Maximine plus interleukin-2 (IL-2)" is false and therefore constitutes a breach of warranty and representation, is rejected. The statement is not false. Maxim's trial *did* demonstrate *a* statistically significant increase – in the liver mets end point group (one of two end points).

Attorneys' Fees, Costs and Expenses. The Merger Agreement provides, in part, that "The prevailing party in any such arbitration (of disputes not successfully resolved pursuant to Section 10.18) shall be entitled to recover from the other party the reasonable attorneys' fees, costs and expenses incurred by such prevailing party in connection with such arbitration." (Demand, Exh. B thereto, p. 46, Par. 10.19) Respondents are deemed to be the prevailing party for this purpose and, as such, shall recover from Claimants their reasonable attorneys' fees, costs and expenses ("Fees and Costs") incurred in connection with this arbitration. Respondents shall serve and file, and cause to be delivered to the Panel by overnight delivery only, their application for Fees and Costs not later than ten (10) business/court days from the date of this Interim Decision. Claimants may serve

and file their comments/opposition ("Opposition") thereto not later than ten (10) business/court days from the date of service of Respondents' application. The issue of the amount of Fees and Costs to be awarded will be decided solely upon the written submissions and without argument or hearing. In their application and Opposition the parties shall address the issue of whether "the cost of arbitrators" in the Merger Agreement (Par. 10.19, p. 46) includes the fees and costs of the American Arbitration Association in addition to the compensation and expenses of the arbitrators or whether such fees and expenses are "costs" or "costs and expenses" potentially recoverable by the prevailing party.

Closing of Hearing. The hearing will be closed upon the service and filing of Claimants' Opposition or, if no Opposition is filed then the hearing will be closed upon the date on which such Opposition was due. The Award will be due thirty (30) days from the date the hearing is closed.

Dated: June 18, 2003

s/ Bruce W. Belding

s/ Richard G. Duncan, Jr.

s/ John J. McCauley

Appendix B

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

Case No. 73 Y 168 00369 02 ARC

Arbitration Between

3i Bioscience Investment Trust, PLC, et al.,

Claimants,

and

Maxim Pharmaceuticals, Inc., et al.,

Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION OR AMENDMENT OF INTERIM DECISION

The Panel has reviewed, carefully considered and conferred regarding Claimants' Motion dated July 3, 2003 for Reconsideration or, in the Alternative, Amendment of the Interim Decision issued herein dated June 18, 2003. After such consideration, the Panel orders that the motion be, and it hereby is, DENIED.

Dated: July 15, 2003

s/ Bruce W. Belding
Bruce W. Belding, Chair,
For, on behalf of and with
the authority and approval
of the Panel

Appendix B

AMERICAN ARBITRATION ASSOCIATION

Case No. 73 Y 168 00359 02 ARC

3I Bioscience Investment Trust PLC, et al.,

v.

Maxim Pharmaceuticals, Inc., et al.

ORDER REGARDING ATTORNEYS' FEES, COSTS AND EXPENSES

After the Panel rendered its Interim Decision dated June 18, 2003 and its Order Denying Motion for Reconsideration or Amendment of Interim Decision dated July 15, 2003, Claimants submitted their Opposition to Respondents' then-pending Application for Fees and Costs (the "Application"). The Panel then requested submissions regarding certain arguments raised in the Opposition (Memorandum to counsel, July 22, 2003). The parties then submitted (a) Respondents' Supplemental Submission and Declaration of Katherine A. Bacal in Support of Application for Fees and Costs dated July 29, 2003 and (b) Claimants' Reply to Respondents' Supplemental Submission Etc. dated August 4, 2003.

The Panel has reviewed, considered and deliberated regarding the foregoing and related submissions and arguments, has reviewed the documents and records from the superior court and court of appeal proceedings that preceded this arbitration, has re-reviewed the applicable provisions of the Merger Agreement and orders as follows:

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Respondents, as the prevailing party (see Interim Decision), are entitled to recover, and shall be awarded, their reasonable attorneys' fees, costs and expenses incurred in connection with the arbitration, commencing with Respondents' receipt of Claimants' Demand for Arbitration, including the proceedings to compel arbitration and including the mediation, through the post-hearing briefing on attorneys' fees, costs and expenses. (Preliminarily it appears to the Panel that pre-arbitration fees and expenses of $331,206 shall, as a result of this decision, be deducted from Respondents' application for fees, costs and expenses. Application, p. 3, fn. 3) Inasmuch as Respondents' initial application included fees and costs through May 31, 2003 (Application, p. 4, fn. 6), Respondents are granted to and including August 21, 2003 to submit their supplemental application for fees, costs and expenses incurred since May 31, 2003. Claimants shall submit any comments and/or opposition – limited to addressing the numbers, amounts sought, claimed 'reasonableness', etc. and not underlying objections to the bases for the application) – on or before September 3, 2003. The issue will then be deemed submitted to the Panel for decision solely upon the written submissions.

Dated: August 11, 2003

s/ Bruce W. Belding
Bruce W. Belding, Chair, for the Panel

APPENDIX C — ORDER GRANTING DEFENDANTS' PETITION TO COMPEL ARBITRATION DATED JANUARY 15, 2002

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL DIVISION

CASE NO. GIC 776631

CROSSPOINT VENTURE PARTNERS 1997, et al.,

Plaintiffs,

v.

MAXIM PHARMACEUTICALS, INC., et al.,

Defendants.

ORDER GRANTING DEFENDANTS' PETITION TO COMPEL ARBITRATION

DATE: January 11, 2002
TIME: 10:30 a.m.
DEPT: 73
JUDGE: S. Charles Wickersham

COMPLAINT FILED: October 19, 2001

Defendant's Petition to Compel Arbitration came on for oral argument in Department 73 of the above-entitled Court, the Honorable S. Charles Wickersham presiding. Robert W. Brownlie and Kathryn B. Riley of Gray Cary appeared on

behalf of the Plaintiffs and Charles H. Dick, Jr. and Katherine A. Bacal of Baker & McKenzie appeared on behalf of Defendants.

After having considered oral arguments of counsel, the papers filed in connection with the petition, as well as the entire file in this matter, and for good cause appearing,

IT IS HEREBY ORDERED that the telephonic ruling granting Defendants' petition to compel arbitration is confirmed, Defendants' petition is granted and the action is stayed pending arbitration.

IT IS SO ORDERED.

Dated: 1/15/02 s/ S. Charles Wickersham
JUDGE OF THE SUPERIOR COURT

Appendix C

SUPERIOR COURT
San Diego County, State of California

The following is a TELEPHONIC, ruling for 1/4/02, Department 73, the Honorable S. CHARLES WICKERSHAM presiding.

Case Number GIC776631

Defendants' motion to compel arbitration is granted and the action is stayed pending arbitration. Plaintiffs are third party beneficiaries of the Merger Agreement (see Section 1.5). Therefore, plaintiffs are bound by the arbitration clause even though most of them did not sign it. If no party requests oral argument within two court days after the tentative ruling is announced, then the tentative ruling becomes the final order of the court. To request oral argument, contact the Court by phoning (619)685-6119. When reserving time for oral argument, the requesting party must be prepared to identify precisely which issues are to be argued and also to prepare written notice to the Court and the opposing party upon obtaining the reservation. Oral argument once reserved will calendared to be heard on January 11, 2002 at 10:30 a.m. in Department 73.

APPENDIX D — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED FEBRUARY 23, 2005

SUPREME COURT OF CALIFORNIA

S130469

CROSSPOINT VENTURE PARTNERS 1997 et al.,

Plaintiffs and Appellants,

v.

MAXIM PHARMACEUTICALS INC. et al.,

Defendants and Respondents;

ROBERT G. MCNEIL,

Intervenor and Appellant.

February 23, 2005, Filed

OPINION: Petition for review & publication request denied.

APPENDIX E — EXCERPTS FROM AGREEMENT AND PLAN OF MERGER AND REORGANIZATION AMONG: MAXIM PHARMACEUTICALS, INC., A DELAWARE CORPORATION; M-80 ACQUISITION CORP., A DELAWARE CORPORATION; AND CYTOVIA, INC., A DELAWARE CORPORATION DATED AS OF JUNE 2, 2000

* * *

Section 10.18. Negotiation of Dispute. If a dispute arises between the parties relating to the interpretation of performance of this Agreement," [the parties shall attempt to negotiate a resolution; if such resolution is not successful] "such dispute may be resolved through arbitration pursuant to Section 10.19.

Section 10.19. Arbitration. Disputes that have not been successfully resolved pursuant to Section 10.18 . . . shall be settled by a panel of three arbitrators with such arbitration to be held in San Diego, California, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

* * *

The arbitrators shall make their decision in accordance with the terms of this Agreement and applicable law.

* * *

Appendix E

The prevailing party in any such arbitration shall be entitled to recover from the other party the reasonable attorneys' fees, costs and expenses incurred by such prevailing party in connection with such arbitration. The decision of the arbitrators shall be final and may be sued on or enforced by the party in whose favor it runs in any court of competent jurisdiction at the option of the successful party. The rights and obligations of the parties to arbitrate any dispute relating to the interpretation and performance of this Agreement or the grounds for the termination thereof, shall survive the expiration or termination of this Agreement for any reason.

* * * *

APPENDIX F — STATUTORY PROVISIONS INVOLVED

9 U.S.C.S. § 1 (2005)

§ 1. . . . "commerce" defined; exceptions to operation of title

> . . . "commerce", as herein defined, means commerce among the several States or with foreign nations, ...

9 U.S.C.S. § 2 (2005)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.